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In the Supreme Court of the United States

OCTOBER TERM, 1983

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In our opening brief we stressed that neither the language nor the history of Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, mentions payment by federal agencies of travel expenses and per diem of employee union representatives engaged in negotiation of a collective bargaining agreement. Respondents do not dispute this key point. See, *e.g.*, FLRA Br. 9, 30. Rather, they offer a variety of reasons why Congress might have wished to require federal agencies to underwrite union travel expenses and per diem and suggest that various difficulties will arise if agencies do not do so.

It is important to recall that the single issue in this case is not whether union negotiators should receive travel expenses and per diem, but whether such expenses should be funded from union dues or from the pockets of federal taxpayers. As we showed in our opening brief, Congress's failure to provide for agency payment of such expenses (especially when viewed in the light of preexisting practice in both the federal sector and the private sector, see Pet. Br. 5-7, 19-21) indicates that it intended that union dues, rather than federal funds, be used for this purpose. That conclusion is in no way inconsistent with the general scheme of federal labor relations Congress established in Title VII. Congress expressly authorized the collection of union dues (see 5 U.S.C. 7115), and travel expenses and per diem of union negotiators presumably are precisely the sorts of expenses that union dues were meant to cover. Use of union dues for this purpose has no unusual or far-reaching consequences; contrary to respondents' suggestions, the mechanics of collective bargaining and the status of federal employee unions are not undermined by use of union dues (as opposed to a federal subsidy) to pay such expenses.

Respondents and amici offer various reasons why Congress might have wished to require federal agencies to underwrite union travel expenses and per diem. See, *e.g.*, FLRA Br. 35-36; NTEU Br. 29-34; AFGE Br. 25-30; NFFE Br. 24-40. But the fact remains that Congress did not include any such requirement in the statute. Although federal employee unions were successful in persuading Congress to enact certain changes in the federal labor relations program, they did not obtain a provision for federal subsidy of union travel expenses and per diem. In effect,

respondents now are attempting to convince this Court to grant "something that [they were] unable to obtain statutorily from Congress." *United States* v. *New Mexico*, 455 U.S. 720, 744 (1982). But "it is not [the Court's] function to engraft on a statute additions which [it] think[s] the legislature logically might or should have made." *United States* v. *Cooper Corp.*, 312 U.S. 600, 605 (1941). See also *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982). Respondents' policy arguments therefore are more properly directed to Congress.

We address below in more detail various contentions urged by respondents. None of these contentions is sufficient to justify the conclusion that Title VII implicitly requires federal agencies, rather than the unions themselves, to underwrite the expenses of union negotiators.

1. Respondents contend that the Authority's order in this case is justified because Congress significantly altered the federal labor relations scheme when it enacted Title VII in 1978. See FLRA Br. 27-32, 36-39; NTEU Br. 16-22. In respondents' view, the fact that Congress made certain changes in that scheme must mean that it also intended to do away with the preexisting policy (see Pet. Br. 5-7) under which federal agencies normally did not subsidize union travel expenses and per diem. In particular, respondents points to Congress's provision for authorization of "official time" for employee union representatives engaged in collective bargaining during the time they otherwise would be in a duty status (5 U.S.C. 7131(a)), its provision for various other benefits to federal employee unions (see, *e.g.*, 5 U.S.C. 7114(b)(4), 7115(a)), and its declaration that federal sector collective bargaining is in the public interest (5 U.S.C. 7101(a)).

The various changes respondents cite do not support their contention; rather, they simply highlight Congress's silence with respect to union travel expenses and per diem. As we pointed out in our opening brief (at 19-20), Congress did not make a complete break with the old executive order program when it enacted Title VII in 1978. Instead, it struck a careful balance between increasing the role of collective bargaining and federal employee unions, on the one hand, and preserving the ability of federal managers to conduct government business in an effective and efficient manner, on the other. The changes Congress chose to make, such as provision for the authorization of official time for employee union representatives engaged in collective bargaining, were discussed in the legislative history and were articulated in the statute itself.[1] In contrast, Congress made no mention of union travel expenses and per diem, despite the fact that it clearly was aware of the need to state its intentions with respect to pay-

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[1] See our opening brief at 19. Respondent FLRA notes (Br. 39 & n.36) that the Comptroller General has stated that his decisions regarding official time under the executive order program have been superseded to the extent they conflict with 5 U.S.C. 7131. Since Title VII nowhere mentions union travel expenses or per diem, there can be no conflict with the Comptroller General's earlier rulings that agency payment of such expenses generally was not authorized. Moreover, even if the earlier rulings were technically superseded, their reasoning tends to undermine the Authority's interpretation of Title VII. See our opening brief at 32-33. Finally, Congress presumably was aware of the Comptroller General's rulings, but expressed no intent to change the practice with respect to travel expenses and per diem. Thus, even if the Comptroller General now has withdrawn those decisions, Congress appears to have codified the rule expressed therein.

ment of travel expenses. As respondent NTEU notes (Br. 22-23), Congress expressly provided in Title VII that members of the Federal Service Impasses Panel would receive reimbursement for travel expenses. 5 U.S.C. 7119(c)(4); see H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 54 (1978). In view of Congress's explicit provision for authorization of official time for employee union representatives and for travel expenses for FSIP members, it would be inappropriate to impute a legislative intent to make a change with respect to union travel expenses and per diem—a subject Congress did not even mention. See *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981).[2]

Congress's declaration that federal sector collective bargaining is in the public interest does not imply that Congress intended agencies to make particular expenditures in support of federal employee unions. As we noted in our opening brief (at 37 n.25), the congressional declaration did not represent any dramatic change in the prevailing policy toward federal

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[2] Respondent NTEU implies (Br. 29) that under the executive order program the travel expenses at issue here would have been paid by the agency under rulings of the Comptroller General that permitted payment for union travel when the agency chose a meeting site for reasons of its own economy and convenience. The record in this case shows that both the union representative and the agency representatives wished to view the new office facility in Sacramento (Keehan deposition of Mar. 7, 1980, at 11; Pet. App. 2a). Thus, the travel cannot be characterized as solely for the convenience of the agency. In any event, the Authority's order here was based on its earlier Interpretation and Guidance (Pet. App. 35a-47a), which set a general policy. The Authority did not require payment of the union representative's travel expenses based on the individual facts of this case and application of rulings of the Comptroller General. Thus, NTEU's point is irrelevant.

sector collective bargaining.[8] Moreover, Congress's provision for collection of union dues (see 5 U.S.C. 7115) suggests just the opposite conclusion—that Congress anticipated that unions would pay their own expenses unless the statute specifically provides otherwise.

Contrary to respondents' suggestions (FLRA Br. 33-35; NTEU Br. 34), the declaration that federal sector collective bargaining is in the public interest and the steps Congress took to encourage it do not mean that private sector practices are irrelevant to the question of Congress's intent with respect to union travel expenses and per diem in the federal sector. As we noted in our opening brief (at 20), payment by the employer of union travel expenses and per diem is not required by statute in the private sector; to the extent employers make such payments, they do so on the basis of negotiated agreements. See, *e.g.*, *Midstate Telephone Co.* v. *NLRB*, 706 F.2d 401, 404-407 (2d Cir. 1983). Our point is that, had Congress intended to deviate from both preexisting federal sector practice *and* private sector practice by making such payments a matter of statutory right, it surely would have referred to this intent at some point in its consideration of Title VII.

2. Respondents also contend (FLRA Br. 25-32, 42-45; NTEU Br. 16-29) that the statutory provision for authorization of official time for employee union

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[8] Executive Order 11491 had made it clear, although in different words, that employee participation in the formulation of personnel practices and policies contributed to the efficient administration of government. The preamble to the executive order stated that such participation should be improved through maintenance of a cooperative relationship between labor organizations and management officials. Exec. Order No. 11491, 3 C.F.R. 861 (1966-1970 Compilations).

representatives engaged in collective bargaining and Congress's declaration that such bargaining is in the public interest require that employee union representatives be considered "on the job" during the time they are engaged in bargaining. Since federal employees receive travel expenses and per diem in connection with job-related travel, respondents conclude that employee union representatives also should receive such payments in connection with travel for the purpose of collective bargaining.

The difficulty with respondents' position is that Congress has not said that employee union representatives are to be treated as if they were on the job during negotiation of a collective bargaining agreement. Instead, Congress provided that employee union representatives "shall be authorized official time" for the purposes of collective bargaining "during the time the employee *otherwise* would be in a duty status." 5 U.S.C. 7131(a) (emphasis added). If Congress had meant for collective bargaining on behalf of a union to be regarded as performance of normal job duties for all purposes, it could have said that employee union representatives are on duty status during negotiations. Instead, Congress chose much narrower language that in fact suggests that it viewed collective bargaining on behalf of a union as distinct from duty status.[4]

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[4] Authorization of official time for purposes of negotiation of a collective bargaining agreement simply does not transform such negotiations into the equivalent of duty status. Employees bargaining on behalf of their union do not act for the agency, and they are not supervised by the agency or rated on the quality of their performance.

The fact that Congress has found the process of federal sector collective bargaining to be in the public interest does not mean that union negotiators and agency negotiators no

Moreover, Congress's very choice of the term "official time" shows that respondents' contention is wide of the mark. That term is one that had acquired a particular meaning in the federal labor relations program. A grant of official time had been interpreted to include payment of an employee's salary, but not entitlement to payment of travel expenses and per diem. See Pet. Br. 6-7; Federal Labor Relations Council, *Report and Recommendations on the Amendment of Executive Order 11491, reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 1264 (Comm. Print No. 96-7, 1979) (stating in discussion of official time that "[o]vertime, premium pay, or travel expenditures are not authorized"). Rather than supporting respondents' contention, Congress's reference to authorization of official time indicates that Congress did *not* intend a federal subsidy for union travel expenses and per diem.

Respondent NTEU (Br. 26-27) cites the fact that when a government employee is assigned to appear in judicial proceedings in his "official capacity," he is entitled to travel expenses (see 5 U.S.C. 5751) and that such an employee is considered to be performing "official duty," in contrast to the "leave" status of an

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longer represent different interests when they sit down at the bargaining table. In the public sector, as in the private sector, the point of collective bargaining is the amicable resolution of conflicting viewpoints. See 5 U.S.C. 7101(a)(1)(C); *Allied Chemical Workers Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187 (1971). Thus, even under Title VII, employee union representatives cannot be said to be acting on behalf of the agency when they engage in collective bargaining.

employee who serves as a juror or witness in an unofficial role. See 5 U.S.C. 6322. NTEU finds the similarity between the terms "official duty" and "official time" to be significant. However, the terms are not identical, and an employee appearing in court on behalf of his agency is obviously in a different position from an employee bargaining on behalf of his union. Congress did not use the term "official duty" in Title VII; rather, it chose to refer to "official time"—a term that (as noted above) previously had been interpreted not to include entitlement to payment for travel expenses and per diem of employee union representatives.[5] Moreover, Congress's express provision

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[5] Respondent NTEU and amicus curiae American Federation of Government Employees also find it significant that Congress provided for authorization of official time, rather than leave status, for employee union representatives engaged in collective bargaining. See NTEU Br. 24-29; AFGE Br. 19-21. But Congress presumably chose official time because it was a term of art that had acquired a certain meaning in the federal labor relations program. Furthermore, leave normally is earned by an employee (rather than being an incident of the employee's position), and approval of a supervisor generally is required before an employee may take leave. Thus, Congress may have believed leave status would be inappropriate in the collective bargaining context.

Respondents point to other contexts in which employee union representatives engaged in collective bargaining may be treated as if they were on the job, including receipt of benefits under the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*, and (perhaps) government liability under the Federal Tort Claims Act, 28 U.S.C. 1346(b). See FLRA Br. 26-27; NTEU Br. 25-26. But the examples indicate only that those particular statutory schemes may be construed as broad enough to encompass injuries or torts that occur in the course of collective bargaining sessions. They do not suggest that Congress intended that employee union representatives be treated for all purposes as if they were on the job.

for travel expenses of witnesses in 5 U.S.C. 5751 again highlights Congress's failure to mention such expenses of employee union representatives in Title VII.

Respondent FLRA also suggests (Br. 43) that payment by agencies of union travel expenses and per diem is proper because 5 U.S.C. 5702 has been read broadly to allow reimbursement in connection with activities such as attendance at conferences sponsored by private organizations. But such attendance presumably is for agency purposes and has been approved by agency supervisors; thus, it can be regarded as job-related. In contrast, an employee union representative acts for the collective bargaining unit and his union, not his agency, when he is engaged in collective bargaining.[6] Again, Congress's choice of

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[6] Respondent FLRA (Br. 42, 43) cites a decision of the Comptroller General, 44 Comp. Gen. 188 (1964), for the proposition that travel expenses may be paid when the purpose of the travel is "sufficiently in the interest of the United States" (*id.* at 189). But the employee in the cited decision was traveling to testify in a criminal proceeding concerning an automobile accident in which another federal employee had been involved. Although the employee was not summoned to testify on behalf of the United States, the outcome of the hearing could have determined the government's liability to a third party under the Federal Tort Claims Act. The Comptroller General therefore concluded that the employee's appearance as a witness would be to the government's advantage and could be considered "official business." The government's interest there was similar to its interest in having an employee appear as a witness on behalf of the United States, unlike the situation here, in which the employee was acting on behalf of his union.

Amicus curiae American Federation of Government Employees cites *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, No. 81-896 (Feb. 23, 1983), for the proposition that

words—"official time," rather than the term "official business" that appears in Section 5702—indicates that it did not intend to require the payments at issue here.

3. Respondents contend (FLRA Br. 19-25; NTEU Br. 34-36) that the Court should apply a deferential standard of review in considering the Authority's statutory interpretation.[7] Respondent FLRA disputes our suggestion (Pet. Br. 29) that deference is

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unions engage in the "official business" of the government. See AFGE Br. 16-17. However, *Perry Education Ass'n* did not raise the question whether a public agency was required to expend public funds to cover union expenses; rather, the issue before the Court was whether a school district that granted access to its interschool mail system and teacher mailboxes to the teachers' exclusive bargaining representative was constitutionally required to grant similar access to rival unions. The Court's remarks were made in the course of explaining why such differential access was reasonable, and the Court appropriately referred to the responsibilities of an exclusive bargaining representative in that connection. In fact, it is not entirely clear what the Court intended to signify by its references to "official business"; in at least one instance, the Court appears to have been referring to the business of the union, rather than the business of the school district employer. See slip op. 13-14 n.10. Of course, *Perry Education Ass'n* does not address the meaning of the term "official business" as it is used in 5 U.S.C. 5702.

[7] Respondent FLRA suggests (Br. 21) that the timing of our challenge to its policy on payment of travel expenses and per diem somehow changes the applicable standard of review. That suggestion is without merit. Whether BATF challenged the policy following issuance of the Authority's initial Interpretation and Guidance or (as here) following application of the policy to BATF, the issue before the Court would be the same—whether the Authority correctly interpreted the statute. No greater deference is due simply because the Authority now has applied its policy to a particular agency.

not due because its interpretation is based in large part on a reading of 5 U.S.C. 5702—a statute the Authority does not administer. FLRA contends (Br. 23-25) that it did not rely heavily on its interpretation of Section 5702, but instead interpreted primarily Title VII. However, a reading of the Authority's Interpretation and Guidance (Pet. App. 35a-47a), which served as the basis for the ruling below, shows that the Authority's use of 5 U.S.C. 5702 was more than incidental. The Authority equated "official time" (the term used in 5 U.S.C. 7131) with "official business" (the term used in 5 U.S.C. 5702) and concluded that the terms were equivalent for the purpose of entitlement to per diem and travel money. See Pet. App. 42a-43a. The reference to Section 5702 was necessary to the Authority's ruling because nothing in Title VII suggests that Congress has required federal agencies to pay union travel bills and per diem.

Respondents urge (FLRA Br. 20 n.15; NTEU Br. 35 n.17) that the proper standard of review is that applicable to statutory interpretations by the National Labor Relations Board.[8] But the Authority's ruling here (unlike rulings of the NLRB) requires the federal government to pay out money. Thus,

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[8] Respondent FLRA seems to suggest (Br. 19-20) that its order should be reviewed under the standard applied to regulations promulgated pursuant to an express delegation of legislative authority. The Authority did not purport to act under such a delegation. 44 Fed. Reg. 42778, 76581 (1979). Moreover, it is clear that Congress did not delegate to the FLRA authority to impose requirements not encompassed by Title VII. Contrast, *e.g.*, *Batterton* v. *Francis*, 432 U.S. 416, 425-426 (1977) (Congress expressly gave agency the authority to prescribe standards for determining what constitutes "unemployment").

principles of sovereign immunity are relevant, and strict construction, rather than deference, is appropriate. As this Court noted recently, "care must be taken not to 'enlarge' [a] waiver of immunity beyond what a fair reading of the language of the [statute] requires." *Ruckelshaus* v. *Sierra Club*, No. 82-242 (July 1, 1983), slip op. 5.[9] Because neither the language nor the legislative history of Title VII expresses an intent by Congress to alter the prevailing policy under which agencies generally did not pay union travel expenses and per diem, a requirement that agencies make such payments may not be read into the statute.[10]

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[9] Respondent FLRA suggests (Br. 40 n.37) that the principle of strict construction of waivers of sovereign immunity applies only in determining whether Congress has consented to a suit against the government. But in *Ruckelshaus* v. *Sierra Club*, *supra*, the question was not whether the government could be sued, but whether, under the provisions of the Clean Air Act, the government could be ordered to pay attorney's fees even though it had prevailed in litigation. The Court did not hesitate to apply the principle of strict construction of waivers of sovereign immunity in concluding that no fee could be awarded because there was no clear showing that Congress intended to change the usual rule that attorney's fees are not awarded against the prevailing party (slip op. 13).

[10] As we noted in our opening brief (at 25-27), our reading of Title VII is reinforced by the principle that a statute should not be interpreted in a manner that would increase the monetary liability of the United States in the absence of clear evidence that Congress intended such a result. See, *e.g.*, *United States* v. *Zazove*, 334 U.S. 602 (1948). Nothing in the cases we cited supports respondent FLRA's contention (Br. 40-41) that this principle of statutory construction applies only to cases dealing exclusively with financial matters.

We note for the record that the Authority has reversed its decision in a case cited at page 25 note 17 of our opening

CONCLUSION

For the foregoing reasons, and the reasons discussed in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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brief. In *United States Naval Space Surveillance Systems* and *Local 2096*, 9 F.L.R.A. No. 30 (June 23, 1982), on reconsideration (August 31, 1983), the Authority concluded that an agency has no obligation under 5 U.S.C. 7131(d) to negotiate concerning authorization of official time for one of its employees to represent the union in a different collective bargaining unit engaged in collective bargaining with a different agency.

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